NO. 42509-2

**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAMOS HANDSOM, APPELLANT
MAUA MUASAU, APPELLANT
MICHAEL SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 10-1-03380-9, 10-1-03381-7, and 10-1-03382-5

# BRIEF OF RESPONDENT

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## B. STATEMENT OF THE CASE.

### 1. Procedure

The State charged defendants, Cody Davis, Damos Handsom, Maua Muasau, and Michael Smith, on August 9, 2010 with one count each of burglary in the first degree. HCP 113–114, MCP 1–2, SCP 258–259.[1] Each count carried deadly weapon enhancements. *Id.* Defendant Davis entered a plea of guilty to burglary in the second degree with a firearm enhancement. 5 RP 469.[2] He was sentenced to 15 months confinement. 5 RP 469. The State also charged defendants Muasau and Smith with one count of assault in the fourth degree. MCP 1–2, SCP 258–259. Defendant Muasau was also charged with one count of felony harassment. MCP 1–2.

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[1] The Clerk's Papers will be referred to as follows: for defendant Muasau: MCP, defendant Handsom: HCP, defendant Smith: SCP.

[2] The State will refer to the verbatim report of proceedings as follows: The nine sequentially paginated volumes referred to as 1–9 will be referred to by the volume number followed by RP. The remaining volumes non-sequentially paginated will be referred to with the date prior to RP.

The Honorable John R. Hickman presided over the trial, which began on July 20, 2011. 3 RP 122.

On July 28, 2011, the jury found Handsom, Muasau, and Smith, guilty of burglary in the first degree. 8 RP 666, HCP 173, MCP 37, SCP 397. The jury also found Muasau guilty of felony harassment and assault in the fourth degree. 8 RP 666, MCP 38, MCP 39. The jury found Smith not guilty of assault in the fourth degree. 8 RP 666, SCP 398. The jury answered yes to the special verdict form finding that each defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of burglary in the first degree. 8 RP 666, HCP 174, MCP 40, SCP 399.

Sentencing for defendant Handsom was held on August 26, 2011. Handsom RP 679[3], HCP 227–239. Handsom's offender score was determined to be a zero and his sentencing range was 15–24 months on the burglary charge. HCP 227–239. The court sentenced Handsom to a low end sentence of 16 months on the burglary charge plus 24 months for the deadly weapon enhancement for a total of 40 months confinement. Handsom RP 695–696, HCP 227–239.

Sentencing for defendant Muasau was also held on August 26, 2011. Muasau RP 679, MCP 92–105. Muasau's offender score was

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[3] There are three separate sentencing transcripts, one for each defendant that are each listed as volume nine. Each volume starts with page number 679. The State will refer to each sentencing by defendant's name, RP, and page citation.

determined to be an 11 for count one (the burglary charge) and his sentencing range was 87–116 months. MCP 92–105. Muasau's offender score was determined to be a nine for count two (the harassment charge) and his sentencing range was 51–60 months. MCP 92–105. Muasau RP 690, MCP 92–105. The court sentenced Muasau to a midrange sentence of 100 months on the burglary charge plus 24 months for the deadly weapon enhancement on the burglary charge with a high-end sentence of 60 months on the harassment charge with counts to run concurrent and the flat time consecutive for a total of 124 months. Muasau RP 690, MCP 92–105.

Sentencing for defendant Smith was held on September 23, 2011. Smith RP 679, SCP 449–459.[4] Smith's offender score was determined to be a seven and he was classified as a persistent offender. Smith RP 705–706, SCP 449–459. Smith's sentencing range was life without the possibility of parole and the court sentenced him accordingly. Smith RP 705–706, SCP 449–459.

Defendants all filed timely notices of appeal. HCP 242–255, MCP 72–85, SCP 467.

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[4] Smith's defense counsel suggested that Smith be sentenced separate from the other defendants because he was facing his third strike. 7/28/2011 RP 676. His defense counsel also had a scheduled knee replacement surgery on August 18, 2011 and suggested that she would not recover in time for the proposed August 26 sentencing date. 7/28/2011 RP 676.

2. Facts

In August, 2010, Mr. Rusty Parrott lived in a trailer home with his cousin Ms. Lois Hopkins, and her boyfriend Mr. William (Bill) Edmiston. 3 RP 148–149, 215. Ms. Hopkins' son, defendant Cody Davis, had lived in the trailer for about a week when the trailer's owner, Mr. Parrott, asked him to leave. 3 RP 150, 236–237. A few days later, when Mr. Edmiston and Ms. Hopkins drove Davis to the County City Building, he was acting unusual and mistakenly believed that his mother had killed his father.[5] 3 RP 151–152, 181. Davis also believed that his father had left gold for him in Mr. Parrott's trailer. 5 RP 448. However, Davis admitted that he "was thinking things that were obviously not true." 5 RP 448. When Davis moved out of Mr. Parrott's trailer, he did not leave any personal belongings behind. 3 RP 152, 218.

Just after midnight on August 8, 2010, Davis returned to the trailer with co-defendants Handsom, Muasau, and Smith. 4 RP 280, 5 RP 459–461. Davis' alleged intention was to obtain his personal belongings that he thought were still in the trailer. 5 RP 454. Defendant Handsom was wearing a ski mask and a military style camouflage flak vest.[6] 4 RP 282,

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[5] Defendant Davis' father was not deceased. 3 RP 182.
[6] A "flak vest" is a "piece of outer clothing worn by military members or members of law enforcement to prevent penetrating trauma from projectiles." RP 282.

5 RP 404. Handsom was also armed with an AK-47 assault rifle. 5 RP 404. One defendant was armed with a pistol. 3 RP 159, 223–224. In addition to Handsom, Smith was also wearing a mask. 3 RP 157.

Mr. Edmiston heard defendants pull into the driveway and saw Davis exit the vehicle. 3 RP 153. Speculating that Davis was there to start trouble, Mr. Edmiston locked the front door of the home and then ran to the back door. 3 RP 154. Neither Mr. Edmiston nor Mr. Parrott gave any of the defendants permission to enter the trailer home. 3 RP 164, 226–227. Defendants attempted to kick the doors in, and Mr. Edmiston braced himself against the back door to keep it closed. 3 RP 154. Meanwhile, Mr. Parrott grabbed a nearby phone in preparation of calling 911 and ran to help Mr. Edmiston secure the back door. 3 RP 222. Mr. Edmiston then saw a "big guy" running down the hallway toward him. 3 RP 156. The "big guy" grabbed both Mr. Edmiston and Mr. Parrott. 3 RP 156. Mr. Edmiston later identified the "big guy" as defendant Muasau. 3 RP 160–161.

As Mr. Parrott was dialing 911, Muasau took the phone and smashed it into a wall. 3 RP 224. He said, "you called 911 didn't you" and then said "I know you did it. Smoke em." 3 RP 225. Davis voiced concern over the threat to Mr. Parrott, and said, "No, you can't kill him. He's my cousin." 3 RP 225. Mr. Parrott thought that the men were going

to kill both he and Mr. Edmiston, and began having a conversation with God. 3 RP 225. Mr. Parrott believed that defendants were capable of carrying out the threat because they had guns. 3 RP 225.

Muasau had Mr. Edmiston and Mr. Parrott get on their knees and requested that they give up the gold. 3 RP 156. Muasau and Davis then went to Davis' former bedroom and began tearing the walls apart. 3 RP 162. Mr. Edmiston described the sound coming from the room as "construction demolition." 3 RP 162. Meanwhile, Handsom and Smith remained in the hallway, holding Mr. Parrott and Mr. Edmiston at gunpoint. 3 RP 163–164. At some point while defendants were inside the trailer home, Muasau came out of Davis' former bedroom and hit Mr. Parrott in the side of the head. 3 RP 161, 171–172, 231–232. One of the other assailants also hit Mr. Edmiston in the head two times with the butt end of a pistol. 3 RP 161, 169. After Muasau and Davis had thoroughly damaged Davis' former bedroom, they claimed to have heard something and left the trailer home. 3 RP 233.

Defendants attempted to leave the premises in a blue Chevrolet Caprice, but were stopped by police immediately after pulling out of Mr. Parrott's driveway. 4 RP 276, 302. Handsom, the driver of the vehicle, was wearing a flak vest and had a ski mask on his head. 4 RP 281–282. Handsom told Officer Ryan Hamilton that an AK–47 was located in the

trunk of the vehicle and that ammunition was located in the glove box. 4 RP 276. Officer Noah Dier discovered a pair of brass knuckles in defendant Smith's front right pocket. 5 RP 402. The vehicle's license plate on the front differed from its license plate on the rear. 4 RP 299.

The vehicle was impounded, and police later obtained a search warrant granting permission to search the vehicle for weapons and ammunition. 4 RP 298, 304. Upon execution of the search warrant, Officer Shawn Noble discovered one black rifle magazine on the floorboard of the driver's seat and one black rifle magazine in the glove box of the vehicle. 4 RP 304. Both magazines contained caliber 7.62 ammunition, which fits the chamber of the AK–47 assault rifle. 4 RP 304–305. Upon examination of the trunk, Officer Noble discovered a cardboard box that contained an AK–47 assault rife, a .380 caliber pistol, and a magazine for the .380 pistol along with ammunition. 4 RP 307. Taped to the exterior of the box was a receipt indicating that the rifle had been purchased by defendant Handsom. 4 RP 314–315. At the time of the search, the AK–47 did not have a magazine loaded into it but the .380 caliber handgun had one round loaded in the chamber. 4 RP 312. Officer Noble explained that the only further action needed to fire the handgun would be to simply pull the trigger. 4 RP 313.

Muasau initially told police that he was coming from a barbeque and that he did not know the other occupants in the vehicle. 4 RP 363. However, when confronted with evidence that a witness had seen him leave the trailer home, Muasau changed his story to reflect that he was actually in the vehicle driven by Handsom. 4 RP 363–361. Muasau later admitted that he knew the other occupants in the vehicle. 5 RP 489, 492–493. The jury also heard testimony that, in 2006, Muasau was convicted of making a false statement to a public servant and that his offense involved lying to a police officer. 5 RP 496.

Upon inspection of the trailer home, Officer Hamilton noticed signs of forced entry. 4 RP 286. The doorjambs to both the front door and back door of the trailer were likely kicked open. 4 RP 286. There were also boot prints on each door. 4 RP 286. The doorframe to the front door of the trailer was splintered "all the way down [to] where the physical force from the kick actually [...] broke the doorjamb so that the door would no longer stay secured." 4 RP 289. The back door incurred similar damage. 4 RP 290.

The injury sustained by Mr. Edmiston was not severe. 3 RP 168. Mr. Parrott's condition was described by Officer Noble as, "extremely scared, very frightened, in a state of trauma, like he had just gone through something very tragic." 4 RP 286. The damage to Mr. Parrott's trailer

was significant. Mr. Edmiston described Davis' old room as having "holes everywhere, paneling half torn down where you can see the wiring [...]." 3 RP 173.

C. ARGUMENT.

1. SMITH'S TIME FOR TRIAL WAS NOT VIOLATED WHEN THE TRIAL COURT GRANTED THE DEFENDANT'S SEPTEMBER 16, 2010 REQUEST FOR A CONTINUANCE.

An appellate court reviews a trial court's decision to grant a continuance under CrR 3.3(f)(2) for abuse of discretion. ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). It will not disturb a trial court's decision unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*, (quoting ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). It is not an abuse of discretion to continue a trial date to permit defense counsel additional time to prepare for trial, to ensure effective assistance of counsel. *See* ***State v. Williams***, 104 Wn. App. 516, 523, 17 P.3d 648 (2001). The continuance may be granted over the defendant's personal objection. ***State v. Campbell***, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

Under CrR 3.3(f)(2), "the court may continue the trial date to a specified date when such continuance is required in the administration of

justice and the defendant will not be prejudiced in the presentation of his or her defense." Under CrR 3.3(b)(5), "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." Under CrR 3.3(e)(3), continuances are excluded from computing time for trial.

Dismissal of charges for an alleged time for trial violation is mandated "only when the applicable speedy trial period has expired."[7] ***State v. Hall***, 55 Wn. App. 834, 840–841, 780 P.2d 1337 (1989). The court in ***Hall*** explained that, "absent such a violation, a defendant must demonstrate actual prejudice to obtain dismissal." *Id.* at 841. *See also* ***State v. Raschka***, 124 Wn. App. 103, 112, 100 P.3d 339 (2004) (emphasizing that the ***Hall*** ruling pertains to the standard of proof required for dismissal when continuances have been granted *within* the time for trial period).

In the present case, the motion to dismiss was not raised below and now is raised for the first time on appeal. The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *see* ***State v. Brewer***, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). Here, defendant has not demonstrated that the September 16, 2010 continuance entered

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[7] ***Hall*** cited to former CrR 3.3(i). The statute is now labeled as CrR 3.3(h). The relevant portions are substantively the same.

within the time for trial was error when it was brought by defendant's attorney on defendant's behalf and entered within the time for trial. Consequently, the September 16, 2010 continuance cannot affect defendant's constitutional rights. The motion to dismiss should not be considered for the first time on appeal.

Furthermore, defendant's September 16, 2010 order for continuance was entered within the time for trial period. Defendant's time for trial began to run when he was charged, on August 9, 2010. CP 258–259. Defendant was being held in custody, so the State had 60 days to bring defendant to trial pursuant to CrR 3.3(b). 9/16/2010 RP 2. On September 16, 2010, when defendant's counsel asked for a continuance, defendant's case was 38 days old. SCP 267. It was not error for the trial court to enter the order for continuance when it was entered within the time for trial.

The physical copy of the September 16, 2010 order for continuance contains a scrivener's error. Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See Black's Law Dictionary*, 582, 1375 (8th ed. 1999). The top box of the continuance form indicates that the continuance is brought "upon agreement of the parties pursuant to CrR 3.3(f)(1)[…]." Just below the top box, is a box that indicates that the continuance is brought because it "is required in the administration of justice pursuant to

CrR 3.3(f)(2) and the defendant will not be prejudiced in his defense [...]." In the present case, the top box was inadvertently checked instead of the middle box. However, the record is clear that the continuance was brought in the administration of justice and not upon agreement of the parties to CrR 3.3(f)(1). This is evident given that defendant argues on appeal that he did not agree to the September 16, 2010 continuance because he did not sign it. Brief of Smith, pages 12–13. Therefore, the continuance could not have been brought pursuant to agreement of the parties pursuant to CrR 3.3(f)(1) which requires a defendant's signature. Before the court granted the September 16, 2010 order for continuance, defendant and his counsel admitted that more time was needed to prepare a defense. 9/16/2010 RP 4. The trial court heard from both parties before granting the continuance. The order for continuance was entered in the administration of justice and did not require defendant's signature.

Because the disputed continuance falls *within* the time for trial period, defendant must demonstrate actual prejudice to obtain dismissal. ***Hall***, 55 Wn. App. at 840–841. Defendant does not attempt to demonstrate that he incurred prejudice as a result of the September 16 order for continuance. In fact, the record reveals that defendant may have been prejudiced *without* the order for continuance. Defendant's counsel made note that defendant was facing his third strike offense, and counsel requested additional time to prepare, negotiate, and investigate on behalf

of defendant. [8] 9/16/2010 RP 4, SCP 267. Defendant even agreed that his attorney needed more time to prepare, and defendant's counsel was unclear as to whether defendant was actually objecting or opposing the continuance. 9/16/2010 RP 4. Moreover, after the September 16, 2010 continuance was entered, defendant brought a continuance on November 15, 2010, which he signed. 11/15/2010 RP 2; CP 269. Defendant then brought a continuance on January 4, 2011, which he signed. CP 273. Defendant also brought and signed a continuance on February 14, 2011. CP 275. Given that defendant asked for and signed three continuances immediately following the disputed September 16, 2010 continuance, it is difficult to see how his defense could be prejudiced by the trial court's entering of the September 16, 2010 order for continuance.

Defendant relies upon two cases, ***State v. Adamski***, 111 Wn.2d 574, 761 P.2d 621 (1988), and ***State v. Kindsvogel***, 149 Wn.2d 477, 69 P.3d 870 (2003), for the proposition that "failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice." Brief of Smith, page 14. ***Adamski*** is distinguishable and the defense fails to provide proper context for its application in the case at hand. The court in ***Adamski*** granted review only

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[8] Smith was on notice early in the trial that he was facing a potential third strike. Smith RP 702. Smith's attorney presented a mitigation packet which the State considered; however, both parties were unable to reach a resolution and Smith chose to exercise his right to a jury trial. Smith RP 702–703.

for defendant's continuance that was entered *outside* of the time for trial period. *Id.* at 576–577. Here, the disputed continuance was entered *inside* of the time for trial period. SCP 267. Thus, the scope of the argument considered in ***Adamski*** is limited to the presupposition that defendant's time for trial right had already been violated. Here, no such presupposition is present.

The court's ruling in ***Adamski*** was further limited to violations of a defendant's time for trial right "caused by the State's failure to exercise due diligence." *Id.* at 579. Even assuming *arguendo* that defendant's time for trial right in the present case had been violated, the continuance had nothing to do with the State's due diligence. In ***Adamski***, the continuance was requested by the State because an essential witness was not present. *Id.* at 576. Here, the continuance was requested by the defense. 9/16/2010 RP 4, SCP 267.

Furthermore, ***Adamski*** has been distinguished by case law. In ***State v. Bible***, 77 Wn. App. 470, 473, 892 P.2d 116 (1995), the defendant relied upon ***Adamski*** to argue that his case should be dismissed with prejudice. The court in ***Bible*** made the following distinctions:

> The ***Adamski*** court was interpreting a Juvenile Criminal Rule which required that the State exercise "due diligence" before a continuance be granted. CrR 3.3(h)(2), which describes the circumstances under which a continuance may be granted in an adult proceeding, only requires findings that a continuance is necessary for the administration of justice and will not substantially prejudice the defense. CrR 3.3(h)(2).

The ruling in ***Adamski*** is based upon an analysis of JuCR 7.8 and should not be broadly interpreted to apply in this case.

Defendant also relies upon ***State v. Kindsvogel***, 149 Wn.2d 477, 69 P.3d 870 (2003) to support the claim that "failure to strictly comply with the speedy trial rule requires dismissal, *regardless of whether the defendant can show prejudice*." Brief of Smith, page 14 (emphasis added). Defendant misstates the law set forth in ***Kindsvogel***. The court in ***Kindsvogel*** does not posit that dismissal is required *regardless of a showing of prejudice*; rather, the court states that "failure to comply with the rule [CrR 3.3] requires dismissal." *Id.* at 482. The court in ***Kindsvogel*** never addressed whether defendant was required to demonstrate prejudice and the record contains no evidence of any continuances. [9] ***Kindsvogel*** does not analyze the facts of the case under CrR 3.3(f), the rule governing instances in which continuances may be granted. *Id.* ***Kindsvogel*** is thus not instructive to the case-at-hand.

The trial court is entitled to use its discretion in granting a continuance requested by defense counsel in behalf of defendant. ***Campbell***, 103 Wn.2d at 14–15. In light of the charged offense being defendant's third strike, defense counsel requested additional time to

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[9] The issue in ***Kindsvogel*** was whether an assault in the fourth degree charge should have been joined with a possession of marijuana charge for purposes of determining time for trial time limits. *Id.* Here, defendant was charged with burglary in the first degree and assault in the fourth degree on the same date. SCP 258–259. Furthermore, it is not disputed that both charges began to run on the same date.

prepare a competent defense. 9/16/2010 RP 4, SCP 267. Because the September 16, 2010 order for continuance was brought within the time for trial, defendant is required to demonstrate prejudice to obtain dismissal. Defendant has not proven that he incurred prejudice. The trial court did not error in entering the continuance requested by defense counsel. [10]

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANTS HANDSOM AND MUASAU GUILTY OF BURGLARY IN THE FIRST DEGREE.

Due process requires the State to prove each and every element of the crime charged beyond a reasonable doubt. ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Hoffman***, 116 Wn.2d 51, 804 P.2d 577 (1991). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); *see also* ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the

[10] Because the order for continuance was during the time for trial and was validly entered, the State does not need to address appellant's argument point "b" as it is not applicable. Brief of Smith, pages 13–14.

evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. Both circumstantial and direct evidence are equally reliable. ***State v. Lubers***, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). ***State v. Theroff***, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Credibility determinations are for the trier of fact and are not subject to review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, defendants Handsom and Muasau were each charged with burglary in the first degree. HCP 113–114, MCP 1–2. A person commits burglary in the first degree if:

> (1) [...] with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. The intent to commit a specific named crime inside the burglarized premises is not an "element" of the crime of burglary. ***State v. Bergeron***, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The intent required is the intent to commit any crime against a person or property inside the burglarized premises. *Id.* at 4. The jury may determine that defendant

acted with intent to commit a crime against a person or building by making inferences "from the facts and circumstances surrounding the commission of the act and from conduct which plainly indicates such intent as a matter of logical probability." ***State v. Kilponen***, 47 Wn. App. 912, 919 P.2d 1024 (1987).

The jury was instructed that to convict defendants Handsom and Muasau, respectively, of the crime of burglary in the first degree as charged in Count I, the following elements had to be proved beyond a reasonable doubt:

> (1) That on or about the 8th day of August, 2010, the defendant or an accomplice entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
>
> (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; and
>
> (4) That any of these acts occurred in the State of Washington.

HCP 175–205; MCP 41-71; Instruction # 8. The jury also received an instruction on accomplice liability. HCP 175–205; MCP 41-71; Instruction #23.

"The State need not show that the principal and accomplice share the same mental state." ***State v. Bockman***, 37 Wn. App. 474, 491, 682

P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. ***State v. Carothers***, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds* in ***State v. Harris***, 102 Wn.2d 148, 685 P.2d 584 (1984); *see also* ***State v. Munden***, 81 Wn. App. 192, 196, 913 P.2d 421 (1996).

a. There was sufficient evidence to find defendant Handsom guilty of burglary in the first degree.

There was sufficient evidence for the jury to find that defendant Handsom was guilty of burglary in the first degree. Defendant Handsom concedes that the State established that Handsom entered or remained unlawfully in the trailer and that he carried a deadly weapon. Brief of Handsom, page 7. However, Handsom argues that he did not form an intent to commit any other crime in addition to the unlawful entry. Brief of Handsom, page 7.

The State does not need to prove that Handsom intended to commit a specific named crime inside the burglarized premises, but does need to prove that he intended to commit a crime against a person or property inside the burglarized premises. ***State v. Bergeron***, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The State presented sufficient evidence from which a

rational trier of fact could infer "from the facts and circumstances surrounding the commission of the act and from conduct which plainly indicates such intent as a matter of logical probability" that Handsom or an accomplice entered or remained unlawfully in Mr. Parrott's trailer with intent to commit a crime. ***Kilponen***, 47 Wn. App. 912 at 919. Both circumstantial and direct evidence are equally reliable. ***Lubers***, 81 Wn. App. 614 at 619.

First, Handsom was "dressed for war" when he was arrested shortly after breaking into Mr. Parrott's trailer home. 5 RP 404. Handsom was wearing a ski mask and a camouflage military style flak vest. 5 RP 404. Handsom's brother (defendant Smith) claimed that Handsom was wearing the items to "keep the peace." 5 RP 404.

Second, Handsom was armed with an AK–47 assault rifle. Handsom himself admitted to Officer Ryan Hamilton to being inside the trailer with the AK–47. 4 RP 375. The AK–47 was later discovered in the trunk of the car Handsom was driving prior to his arrest. 4 RP 307. Officer Noble also discovered a receipt for the AK–47 indicating that the firearm was purchased by Handsom. 4 RP 314–315.

Third, Handsom held Mr. Edmiston and Mr. Parrott at gunpoint with an AK–47. Mr. Edmiston was placed on his knees and looked down the barrel of a rifle that was pointed at him. 3 RP 199, 228–229. Mr.

Parrott believed that the defendants were going to kill both he and Mr. Edmiston. 3 RP 225. Furthermore, while Handsom held the victims at gunpoint, Muasau and Davis were able to destroy part of Mr. Parrott's trailer.

Fourth, Handsom was driving a vehicle that had a different license plate on the front of the vehicle from the plate on the rear of the vehicle. Officer Noble testified that, should a witness observe the license plate and provide it to police, police would not be able to locate the actual vehicle that the license plate was on because the license plate actually belonged to a different vehicle. 4 RP 301.

The jury was justified in inferring that, given the totality of evidence presented by the State, defendant Handsom, or an accomplice, formed an intent to commit a crime in addition to the unlawful entry of Mr. Parrott's trailer. Handsom held Mr. Parrott and Mr. Edmiston at gunpoint with an AK-47 assault rifle while two other defendants destroyed a portion of Mr. Parrott's trailer.

Defendant relies upon alleged similarities between the present case and the facts in ***State v. Sandoval***, 123 Wn. App. 1, 94 P.3d 323 (2004) to argue that defendant's conviction should be reversed and dismissed with prejudice. Brief of Handsom, pages 7–10. The defendant in ***Sandoval*** was an alcoholic. *Id.* at 3. After consuming a 12-pack of beer and

drinking more beer at a nearby tavern, defendant Sandoval kicked open an apartment door and was confronted by the occupant. *Id.* at 3. Sandoval did not know that anyone was in the apartment, and he did not know the occupant. *Id* at 5. Sandoval seemed surprised to see the occupant, and shoved him in the chest. *Id.* at 3, 5. The occupant took a few steps back and then punched Sandoval in the head and restrained him until police arrived. *Id.* at 3. Sandoval was convicted of first degree burglary, but his conviction was reversed on grounds that the evidence did not support the inference that defendant intended to commit a crime inside of the apartment. *Id.* at 5–6.

***Sandoval*** is distinguishable. The defendant in ***Sandoval*** was an alcoholic and was intoxicated when he kicked open the apartment door. *Id.* at 3. In the present case, nothing on the record indicates that defendant Handsom was intoxicated during the incident. Additionally, the defendant in ***Sandoval*** did not know that anyone was in the apartment. *Id.* at 5. Here, at least one member of the armed team of defendants knew the home was occupied. Mr. Edmiston had a conversation through the front door of Mr. Parrott's trailer with defendant Davis immediately prior to the break-in. 3 RP 154. Davis even testified that he knew Mr. Parrott and Mr. Edmiston were in the home prior to breaking the door in. 5 RP 466–467. By Handsom's own admission to Officer Hamilton, he was in the trailer

with the AK-47 to "keep things from escalating." 4 RP 375. Unlike ***Sandoval***, nothing in the present case indicates that defendants were surprised to see someone in the trailer home.

Furthermore, the defendant in ***Sandoval*** did not know the occupant of the apartment. *Id.* at 5. Here, defendant Handsom had been introduced to Mr. Edmiston a couple of times through a mutual friend. 3 RP 160, 188. Mr. Edmiston had also been introduced to defendant Muasau a couple of times as well. 3 RP 159. Both Mr. Edmiston and Mr. Parrott were acquainted with defendant Davis because he was a relative of Mr. Parrott and had been living in the trailer previous to the incident at hand.

Moreover, the act of violence upon breaking into the apartment in ***Sandoval*** is significantly different than the act of violence in the present case. The only physical violence against the occupant in ***Sandoval*** was a shove, after which the occupant was able to fight back and subdue the defendant. *Id.* Here, defendants Smith and Handsom held both Mr. Edmiston and Mr. Parrott at gunpoint and defendant Muasau threatened to kill the victims. Mr. Parrott and Mr. Edmiston were not able to fight back, and were certainly not able to subdue any of the defendants. Additionally, ***Sandoval*** was an unplanned act of violence that occurred after the defendant consumed alcohol. Here, the four defendants planned out the attack on Mr. Parrott's trailer and came prepared to inflict harm.

The jury in the present case was permitted to infer "from the facts and circumstances surrounding the commission of the act and from conduct which plainly indicates such intent as a matter of logical probability" that Handsom or an accomplice entered or remained unlawfully in Mr. Parrott's trailer with intent to commit a crime. ***Kilponen***, 47 Wn. App. 912 at 919. After breaking into the trailer home, defendant Handsom held Mr. Parrott and Mr. Edmiston at gunpoint with an AK-47 assault rifle while two of Handsom's co-defendants destroyed a portion of Mr. Parrott's trailer. The State presented sufficient evidence for a jury to determine that Handsom was guilty of burglary in the first degree.

b. There was sufficient evidence to find defendant Muasau guilty of burglary in the first degree.

There was sufficient evidence for the jury to find that defendant Muasau was guilty of burglary in the first degree. Defendant argues that, because "the State failed to prove [Muasau] committed a crime in Parrott's trailer," it failed to prove that Muasau entered and remained in the trailer with criminal intent. Brief of Muasau, page 20. However, the State does not need to prove that a crime was committed inside the trailer, but that defendant's act of entering or remaining in the trailer was with intent to commit a crime. MCP 41–71, Instruction # 9. While evidence that

Muasau actually committed a crime inside the trailer lends credibility to the notion that he entered or remained in the burglarized premises with intent to commit a crime, the intent to commit a specific named crime inside the burglarized premises is not an "element" of the crime of burglary. ***State v. Bergeron***, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The jury may determine intent by making inferences "from the facts and circumstances surrounding the commission of the act and from conduct which plainly indicates such intent as a matter of logical probability." ***State v. Kilponen***, 47 Wn. App. 912, 919 P.2d 1024 (1987). Even if the State was required to prove Muasau actually committed a crime in addition to the unlawful entry of Mr. Parrott's trailer, the jury found Muasau guilty of felony harassment and assault in the fourth degree. 8 RP 666; MCP 37.[11]

Here, the State presented sufficient evidence for the jury to conclude that Muasau, or an accomplice, entered or remained in the trailer with intent to commit a crime.

First, Muasau intended to commit a crime against Mr. Parrott; specifically, he threatened to kill Mr. Parrott. 3 RP 224–225. Muasau interrupted Mr. Parrott's attempt to call 911 and, when Mr. Parrott

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[11] Defendant challenges both charges on appeal. *See* argument section *infra* pp. 32–42 for the State's argument in support of the jury's determination of guilt.

explained that the 911 call did not go through, Muasau said, "I know you did it. I know you called them. Smoke 'em." 3 RP 224–225. Mr. Parrott interpreted this statement as a threat to "kill me, kill us." 3 RP 225. Mr. Parrott believed that the defendants were capable of carrying out the threat because they had guns. 3 RP 225. Furthermore, Muasau used his fist to hit Mr. Parrott in the head. 3 RP 231. Mr. Edmiston witnessed the act of violence. 3 RP 161.[12]

Second, Muasau intended to commit a crime against Mr. Parrott's property. Muasau destroyed the walls of a bedroom in Mr. Parrott's home. 3 RP 162. Mr. Edmiston saw Muasau and Davis go into the back bedroom of the trailer and heard them tearing the room apart. 3 RP 162. Officer Shawn Noble described the damage as follows:

> A large section of the wall had – the wood siding from the wall had actually been ripped down. [...] insulation from the trailer [...] had been pulled out of that area where the wall had been torn down. And this insulation was strewn about the room as if it had been ripped out and just kind of thrown down on the ground.

3 RP 290–291. Officer Noble testified that he "could tell that [the damage] had been freshly done." 4 RP 290.

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[12] *See* argument section *infra* beginning p. 39 for the State's argument in support of the jury's finding that defendant is guilty of assault in the fourth degree.

The State presented sufficient evidence for the jury to determine that, given the totality of evidence, defendant Muasau or an accomplice formed an intent to commit a crime in addition to the unlawful entry. Muasau himself threatened to kill Mr. Parrott, hit Mr. Parrott in the head, and destroyed part of Mr. Parrott's trailer.

Defendant argues that the State failed to prove intent for the same reasons that the State in ***State v. Woods***, 63 Wn. App. 588, 821 P.2d 1235 (1991) failed to prove intent. Brief of Muasau, page 22. In ***Woods***, Division One reversed juvenile defendant's conviction for burglary in the second degree. *Id.* Defendant Woods and his friend J.B. had been living away from home due to problems he had been having with his mother. J.B. kept his belongings inside his mother's home and was only allowed to enter if she was also there. On the day of the incident, Woods and J.B. stopped by J.B.'s mother's house to pick up a raincoat. J.B. opened one of the locks with a key, and one of the boys kicked the door in. The boys were startled to see J.B.'s mother inside, and fled the scene. *Id.* at 589–590. In ***Woods***, the State argued that defendant formed intent to commit a crime in the burglarized premises based upon the amount of force used in kicking the door in. *Id.* at 591. The court rejected this argument. *Id.* at 592.

***Woods*** is distinguishable. Whereas the State in ***Woods*** solely relied upon the amount of force defendant used in entering the apartment to establish intent to commit a crime, the State in the present case presented several pieces of evidence from which the jury could have found intent. The State established that defendant Muasau (a) broke into Mr. Parrott's trailer with a team of armed men; (b) threatened to kill Mr. Parrott; (c) destroyed a portion of Mr. Parrott's trailer; and (d) hit Mr. Parrott in the head. This evidence is more than what the evidence was in ***Woods***.

Moreover, in ***Woods***, the defendant left immediately upon seeing someone in the home. Here, the defendants held Mr. Parrott and Mr. Edmiston at gunpoint, ripped the walls of the trailer home apart, threatened to kill Mr. Parrott, and hit him in the face, before leaving. 3 RP 233–234. Furthermore, in the present case, none of the defendants had permission to enter Mr. Parrott's trailer. 3 RP 181, 226–227. In ***Woods***, one of the boys did have permission. Also, in ***Woods***, one of the boys had possessions in the apartment. Here, the defendant who used to live in the trailer, Davis, did not have any possessions left in the trailer. 3 RP 152.

The present case is also distinguishable from ***State v. Sandoval***, 123 Wn. App. 1, 94 P.3d 323 (2004), cited by defendant. The distinctions are similar to the preceding analysis regarding defendant Handsom's

convictions; namely, that (1) defendant knew the home was occupied before breaking into it, (2) defendant and Mr. Edmiston were not strangers[13]; and (3) defendant was part of a team of armed men who held victims at gunpoint, rather than a drunken individual who merely shoved an occupant.[14]

The defense argues that defendants entered Mr. Parrott's trailer without criminal intent. Brief of Muasau, page 21. Elaborating on this notion, the defense makes the following claim: "that the purpose was the product of Davis's delusional mind does not matter so long as the men actually believed they had a lawful purpose." Brief of Muasau, page 21. The defense does not cite any case law supporting this assertion. Even if the men believed they had lawful purpose in entering the trailer by kicking the doors in, which is certainly a stretch, they surely did not have lawful purpose in remaining in the trailer; thereby holding Mr. Parrott and Mr. Edmiston at gunpoint, destroying parts of Mr. Parrott's trailer, threatening to kill Mr. Parrott, and hitting Mr. Parrott in the face. In fact, the jury was instructed that the "entering *or remaining* was with intent to commit a crime against a person or property therein." MCP 41–71, Instruction # 9

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[13] 3 RP 159–160

[14] For a more detailed discussion of the differences between ***Sandoval*** and the present case, see *supra* pp. 22–25.

(emphasis added). Muasau remained in the trailer for at least 10 minutes. 3 RP 162, 229. During this time, Muasau threatened to kill Mr. Parrott, tore apart the wall of Mr. Parrott's trailer, and punched Mr. Parrott in the face.

Furthermore, the jury heard Muasau testify at trial and was entitled to believe the testimony of Mr. Edmiston and Mr. Parrott over the testimony of Muasau. Credibility determinations are for the trier of fact and are not subject to review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Mr. Parrott testified that Muasau interrupted Mr. Parrott's attempt to call 911 and threatened to kill him. 3 RP 224–225. Muasau testified that he did not know if he grabbed the telephone away from one of the individuals within the trailer or if he told codefendants to "smoke" Mr. Parrott and Mr. Edmiston. 5 RP 494–495. The jury also heard that Muasau was convicted in 2006 of making a false statement to a public servant, which involved lying to a police officer. 5 RP 496. The State presented sufficient evidence for the jury to assess the credibility of Mr. Edmiston's and Mr. Parrott's testimony over defendant Muasau, and conclude that Muasau or an accomplice acted with intent to commit a crime. 8 RP 666, MCP 37. The State presented sufficient evidence that defendant committed burglary in the first degree.

### 3. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT MUASAU GUILTY OF FELONY HARASSMENT.

In the instant case, the jury was instructed that to convict defendant Muasau of the crime of felony harassment as charged in Count II, the following elements had to be proved beyond a reasonable doubt:

> (1) That on or about the 8th day of August, 2010, the defendant *knowingly* threatened to kill Rusty Parrott *immediately or in the future*;
>
> (2) That the words or conduct of defendant placed Rusty Parrot in reasonable fear that the threat to kill would be carried out;
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the threat was made in the State of Washington.

MCP 41–71, Instruction #16 (emphasis added). The jury instruction for felony harassment mirrors RCW 9A.46.020.[15]

The jury was also instructed as to the following definition of harassment:

> A person commits the crime of harassment when he, without lawful authority, *knowingly* threatens to cause bodily injury *immediately or in the future* to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried

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[15] In 1997, the language "immediately or" was added to section (1)(a)(i) of RCW 9A.46.020. Laws of 1997, ch. 105, § 1.

> out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.

MCP 41–71, Instruction #15 (emphasis added).

The jury was also instructed that a *threat* is defined as follows:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury *in the future* to the person threatened or to any other person. To be a threat, a statement or act must occur in a contest or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

MCP 41–71, Instruction #17 (emphasis added).

a. There was sufficient evidence to find that Muasau *knowingly* threatened Mr. Parrott.

To *knowingly* threaten another, a defendant must (a) subjectively know that he or she is communicating a threat, and (b) know that "the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person." ***State v. J.M.***, 144 Wn.2d 472, 481, 28 P.3d 720 (2001). Merely writing a threat in a diary or muttering a threat unaware that it might be heard does not fulfill the *knowingly* requirement. *Id.* at 481. Loudly yelling a threat when a person thinks no one else is around does not fulfill the *knowingly* requirement. *Id.* at 481. There is no scienter requirement in the definition

of "threat." *Id.* at 485. It is irrelevant whether the speaker actually intends to carry out the threat. *Id.* at 481–482. *See also* ***In re Detention of Danforth***, 153 Wn. App. 833, 842, 223 P.3d 1241 (2009) *citing* ***State v. Kilburn***, 151 Wn.2d 36, 38, 84 P.3d 1215 (2004).

In the present case, and viewing the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find that defendant Muasau knowingly threatened Mr. Parrott.

The context surrounding the threat supports an inference that Muasau knowingly threatened Mr. Parrott. Just moments prior to threatening Mr. Parrott, Muasau interfered with Mr. Parrott's 911 call for help. 3 RP 224. Muasau grabbed the phone from Mr. Parrott, questioned Mr. Parrott about whether he called 911, and then threw the phone into the wall and destroyed it. 3 RP 224. Mr. Parrott was so concerned for his life that he had a conversation with God, saying "I'm ready, let's go." 3 RP 226. Furthermore, Mr. Parrott understood Muasau's intention as a threat to kill. 3 RP 225. Defendant Davis also understood Muasau's intention to be a threat to kill and said, "No, you can't kill him. He's my cousin." 3 RP 225. Muasau was not merely writing a threat in a diary or yelling a threat when nobody was around. Muasau issued the threat immediately after interfering with Mr. Parrott's 911 call for help and directly in front of Mr. Parrott and two armed defendants. 3 RP 224–226. There was

sufficient evidence for the jury to find that defendant Muasau *knowingly* threatened Mr. Parrott.

b. The State was not required to prove that Muasau intended to cause bodily injury in the future, where the to convict instruction properly identified each element of the offense.

"The State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." ***State v. Hickman***, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Definitional jury instructions cannot be challenged for the first time on appeal. ***State v. Stearns***, 119 Wn.2d 247, 249–250, 830 P.2d 355 (1992). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *see* ***State v. Brewer***, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). "As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining the terms used in the elements is not of constitutional magnitude." *Id.* at 250.

Defendant did not object to the jury instructions below and cannot raise the issue for the first time on appeal. ***Brewer***, 148 Wn. App. at 673. Furthermore, definitional jury instructions cannot be challenged for the

first time on appeal. ***Stearns***, 119 Wn.2d at 249–250. Defendant does not assign error to instruction 17, the definitional instruction for "threat." Where no assignment of error has been made, the court will generally not consider a claimed error. *See* ***Painting and Decorating Contractors of America v. Ellensburg School District***, 96 Wn.2d 806, 814-815, 638 P.2d 1220 (1992). The court should not address this issue for the first time on appeal.

If the court does decide to address this issue, defendant does not contest that the to-convict instruction contains each element of the offense for felony harassment. It is also uncontested that the to-convict instruction contains no added elements. The defense cites to ***State v. Hickman***, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); ***State v. Willis***, 153 Wn.2d 366, 374–375, 103 P.3d 1213 (2005); and ***State v. Nam***, 136 Wn.App. 698, 706–707, 150 P.3d 617 (2007), to argue that the State was essentially required to prove the content of the definitional jury instruction of "threat." Brief of Muasau, pages 14–15. None of the three cases cited by defendant squarely address the issue at hand: whether the State must prove the content of a definitional jury instruction as an element of the crime where the to-convict instruction properly identifies each element of the charged offense.

In ***Hickman***, the to-convict jury instructions included the added element of venue for the crime of insurance fraud. The Washington Supreme Court ruled that the State had thus assumed the burden of proving the added element of venue for the crime of insurance fraud. ***Hickman***, 954 P.2d 900 at 904. In ***Willis***, the jury received a special verdict instruction which indicated that the defendant must be armed with a weapon but omitted the phrase, "or an accomplice." *Id.* at 1217. Consequently, the court ruled that the State was required to prove that defendant himself was armed. *Id.* at 1217. In ***Nam***, the State omitted part of an element in the to-convict jury instructions. ***Nam***, 150 P.3d 617 at 621. The court held that the State was required to prove the elements of the offense as described in the to-convict jury instructions, despite the partial omission of the element. *Id.* at 621. In the present case, an element has not been added or omitted. Here, the State presented the proper elements of the offense for felony harassment in the to-convict jury instructions.

Because the to-convict jury instruction properly outlined the elements of harassment with no added elements or omitted elements, the Court does not need to consider ***City of Seattle v. Allen***, 80 Wn. App. 824, 911 P.2d 1354 (1996) and ***State v. Austin***, 65 Wn. App. 759, 831 P.2d 747 (1992), cited to by defendant in support of the claim that "the State failed

to prove a future intention." Brief of Muasau, page 15. The uncontested to-convict instructions properly informed the jury that the State was required to prove that defendant Muasau intended to cause bodily injury immediately or in the future. The State was not required to prove that defendant intended to cause bodily injury only in the future. As argued above, the State presented sufficient evidence to prove the required elements.

The *to-convict* instructions properly informed the jury that, to convict defendant of the crime of harassment, it needed to find that "[. . .] the defendant knowingly threatened to kill Rusty Parrott *immediately or in the future*; [. . .]." MCP 41–71, Instruction #16 (1) (emphasis added). The State was thus not required to prove that defendant intended to cause bodily injury only in the future.

### 4. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT MUASAU GUILTY OF ASSAULT IN THE FOURTH DEGREE.

Assault is a willful act. ***State v. Davis***, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) *citing* ***State v. Hopper***, 118 Wn.2d 151, 158, 822 P.2d 775 (1992). *See also* ***State v. Stevens***, 158 Wn.2d 304, 314, 143 P.3d 817 (2006). Because an assault is, by definition, an intentional act, "the statutory element 'assault' convey[s] the non-statutory 'intent'

requirement. ***State v. Matthews***, 60 Wn.App. 761, 767, 807 P.2d 890 (1991). The intent required for assault is "merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act." ***State v. Jarvis***, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011). Fourth degree assault is essentially an assault with little or no bodily harm, committed without a deadly weapon. ***State v. Hahn***, 174 Wn.2d 126, 129, 271 P.3d 892 (2012).

In the instant case, the jury was instructed that to convict defendant Muasau of assault in the fourth degree as charged in Count III, the following elements had to be proved beyond a reasonable doubt:

> (1) That on or about the 8th day of August, 2010, the defendant or an accomplice assaulted Rusty Parrot; and
>
> (2) That the act occurred in the State of Washington.

MCP 41–71, Instruction #20.

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence for the jury to conclude that Muasau's act of hitting Mr. Parrott in the face was intentional. The defense asserts that "[...] the hit could easily have been accidental as [Mr.] Parrott was on his knees in the hallway when he was struck with Mr. Muasau's fist." Brief of Muasau, page 18. This does not look at the evidence in the light most favorable to the State as required by case law. ***Hoffman***, 116 Wash.2d 51 at 82. Mr. Parrott was on his knees because he was being

held at gunpoint by Muasau's co-defendants, whilst Muasau and Davis tore apart the walls in Mr. Parrott's trailer. Even if the chances of Muasau's fist accidentally colliding with Mr. Parrott's face are greater than they normally would be due to Mr. Parrott being held at gunpoint on his hands and knees, there is no evidence that it actually was an accident. There is, however, evidence that Muasau was aggressive toward Mr. Parrott. Muasau threatened to kill Mr. Parrott for attempting to dial 911. 3 RP 224–225. Viewing evidence in the light most favorable to the State, the jury was permitted to conclude that Muasau's fist did not accidentally collide with Mr. Parrott's right cheek. Muasau intentionally hit Mr. Parrott in the face.

The defense challenges whether the State established that Muasau's hitting of Mr. Parrott was offensive to an ordinary person. Brief of Muasau, pages 17–19. The jury was instructed that, "a touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive. MCP 41–71, Instruction #22. It is axiomatic that a person will be offended if hit in the face. This is especially evident for Mr. Parrott given the context surrounding the altercation. Mr. Parrott never gave Muasau permission to enter the trailer home. 3 RP 226. Muasau threatened to kill Mr. Parrott. 3 RP 224–225. Mr. Parrott was held at gunpoint by two men who were with Muasau. 3

RP 228–229. The State presented sufficient evidence for the jury to conclude that Muasau's act of hitting Mr. Parrott in the face was offensive.

Defendant claims that the State relied upon the following definition of assault in the fourth degree: "an intentional touching or striking that would be harmful or offensive to an ordinary person who was not unduly sensitive, *regardless of the physical injury caused*." Brief of Muasau, page 17 (emphasis added). Defendant misstates the jury instruction for assault in the fourth degree. The jury was instructed that an assault is "an intentional touching or striking of another person, that is harmful or offensive regardless *of whether any injury is done to the person*." MCP 41–71, Instruction #22 (emphasis added). Defendant's interpretation of the jury instruction presupposes that the victim has incurred some type of physical injury, whereas a proper interpretation does not. Defendant notes that "the hit left no bruises or marks on [Mr.] Parrott" and that Mr. Parrott did not describe "feeling any pain or injury." Brief of Muasau, pages 18–19. However, the State is not required to prove that the victim incurred any type of physical injury. MCP 41–71, Instruction #22.

A jury of twelve ordinary people weighed the evidence at trial and determined that Muasau's act was intentional and harmful or offensive to an ordinary person. 8 RP 666. After breaking into Mr. Parrott's trailer, Muasau interfered with Mr. Parrott's 911 call, threatened to kill Mr.

Parrott, destroyed part of Mr. Parrott's trailer, and hit Mr. Parrott in the face. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence for the jury to conclude that Muasau's act of hitting Mr. Parrott in the face was intentional and harmful or offensive.

### 5. DEFENDANT MUASAU FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article I, § 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance

claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

***Jeffries***, 105 Wn.2d at 418; *see also* ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State***

v. ***Foster***, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

***State v. Lord***, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the ***Strickland*** test.

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

***Lord***, 117 Wn.2d at 883 (citing ***Strickland***, 466 U.S. at 689-90).

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. ***Strickland***, 466 U.S. at 697; ***Lord***, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. ***McFarland***, 127 Wn.2d at 335 (citing ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the

reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S. at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689.

The applicable statute, RCW 9.94A.589(1)(a), reads:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

The statute defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The burglary anti-merger statute is also applicable. Under RCW 9A.52.050, "Every person who, in the commission of a burglary shall

commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

In the present case, defendant must demonstrate that his counsel's performance was deficient. ***Strickland***, 466 U.S. 668 at 687. A review of the entire record, as is required by case law, shows that counsel zealously advocated for defendant Muasau at trial. Defense counsel objected to motions in limine, made several objections throughout trial, cross-examined witnesses, and made closing arguments. The trial was a true demonstration of the adversarial system. Defendant received constitutionally effective assistance of counsel.

Defendant must also demonstrate that he incurred prejudice as a result of his counsel's alleged deficient performance. ***Strickland***, 466 U.S. 668 at 687, 692. Under this prong of a ***Strickland*** analysis, defendant must show a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. 668 at 694. Here, defendant argues that, had the issue of same criminal conduct been considered, the result of defendant's proceeding would have been different in that the court would have sentenced defendant under RCW 9.94A.589 (thus merging defendant's convictions). Brief of Muasau, pages 27–28. Therefore, defendant must show that the court would *not* have applied the burglary anti-merger

statute. Otherwise, even if defendant's counsel did raise the issue of merger (thus curing the alleged deficient performance), the proceeding would have been unchanged and defendant's present claim for ineffective assistance of counsel would fail for failure to demonstrate prejudice.

There is no showing that the trial court would *not* have applied the anti-merger statute. The defense believes that the trial court's following statement made during sentencing indicates otherwise:

> But I think some leniency should be shown to [Muasau] just in the sense as to how stupid and senseless this whole thing was. I sense that the jury felt the same way but followed the instructions of the court. I think this was a tough case for this jury, but they followed the law and they followed the instructions of the Court.

9 RP 690 Muasau. However, ***Strickland*** expressly states that the "assessment of prejudice [...] should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward leniency." ***Strickland***, 466 U.S. 668 at 695. The court further stated that, "although these factors [referring to the idiosyncrasies of a decisionmaker] may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, *they are irrelevant to the prejudice inquiry*." ***Strickland***, 466 U.S. 668 at 695 (emphasis added). Here, the trial court's imposition of a mid-range sentence for the burglary charge and a high end sentence for the

harassment charge indicates that the court was not unduly swayed by notions of leniency.[16] The defense's reliance upon the apparent leniency of the trial court is thus misplaced.

Even if the court did not apply the burglary anti-merger statute, the outcome would likely have remained the same because the charges are not based upon the same criminal conduct. Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *See* ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. ***Lessley***, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. ***State v. Haddock***, 141 Wn.2d 103, 3 P.2d 733 (2000).

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[16] *See supra* p. 3-4 for further details of defendant Muasau's sentencing.

Defendant argues that the felony harassment and burglary charges were committed at the same time and place, against one victim and involved the same objective criminal intent. Brief of Muasau, page 25. Defendant also asserts that the assault and burglary charges should merge under RCW 9.94A.589(1)(a). Brief of Muasau, page 25. However, defendant's acts of felony harassment and assault in the fourth degree do not constitute "same criminal conduct" as burglary in the first degree for purposes of RCW 9.94A.589(1)(a).

First, defendant's crimes do not share the same intent. Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. ***Lessley***, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. ***Flake***, 76 Wn. App. at 180; ***State v. Dunaway***, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. ***Lessley***, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." ***Dunaway***, 109 Wn.2d at 215. The Supreme Court of Washington has held that objective intent is "measured by determining whether one crime furthered another." ***Lessley***, 118 Wn.2d at 778. When a defendant has the time to "pause, reflect, and either cease his criminal

activity or proceed to commit a further criminal act," and makes the decision to proceed, the defendant has formed a new intent to commit the second act. ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

The intent to commit first degree burglary is different than the intent to commit felony harassment. The intent required for first degree burglary is "intent to commit a crime against a person or property therein." RCW 9A.52.020(1). The intent required for felony harassment is to "knowingly" threaten to "[kill] immediately or in the future the person threatened or [...] any other person." RCW 9A.46.020(1)(a)(i). The plain language of the two crimes shows that the objective intent is not the same.

In the present case, defendant's objective intent was to break into Mr. Parrott's trailer with intent to (a) obtain gold and (b) commit a crime. The intent to obtain gold is clear from defendant's brief, in which defendant claims that "the men entered [Mr.] Parrott's trailer with a lawful purpose: to retrieve Davis's gold." Brief of Muasau, page 21. The objective intent to commit a crime is clear from the way that defendants performed the burglary: defendants came armed with weapons, defendant Handsom was wearing a flak vest, and the Chevrolet Caprice driven by defendants had different license plates on the front and rear of the vehicle.

Defendant Muasau did not form the intent required for felony harassment (the intent to threaten to kill Mr. Parrott) until he saw Mr. Parrott attempting to dial 911 for help. 3 RP 224. After breaking into Mr. Parrott's trailer, defendant grabbed Mr. Parrott's phone, smashed it into a wall, and then threatened to kill Mr. Parrott. 3 RP 224.[17] Defendant had time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." ***Grantham***, 84 Wn. App. 854 at 859. Defendant chose to proceed, and thus formed a new intent to commit the second act (felony harassment). *Id.* at 859.

Second, defendant's convictions were not committed at the same time. Although all crimes took place at Mr. Parrott's residence, not all of the crimes took place at the same time. The burglary of Mr. Parrott's home took place as soon as defendant unlawfully entered the trailer with intent to commit a crime.[18] Defendants did not have permission to enter the home, and were armed with weapons, a flak vest, and a vehicle with mismatched license plates. The harassment of Mr. Parrott took place after

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[17] It is irrelevant whether defendant actually intended to carry out the threat. ***State v. J.M.***, 144 Wn.2d 472 at 481–482.

[18] The intent to commit a specific named crime inside the burglarized premises is not an "element" of the crime of burglary. ***State v. Bergeron***, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

Muasau saw Mr. Parrott attempting to dial 911 for help. The burglary and the harassment did not occur at the same time.

Third, both the burglary and felony harassment convictions have multiple victims, are not the same criminal conduct and do not merge. The concept that crimes involving multiple victims equal same criminal conduct has been rejected.

> Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. RCW 9.94A.010(1), (4). As one commentator has noted, "to victimize more than one person clearly constitutes more serious conduct" and, therefore, such crimes should be treated separately. D. Boerner, Sentencing in Washington § 5.8(a) at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

***State v. Dunaway***, 109 Wn.2d at 251, *see also* ***Lessley***, 118 Wn.2d 773.

In the present case, the burglary conviction has multiple victims. Both Mr. Parrott and Mr. Edmiston were living in the trailer when the burglary occurred. The felony harassment conviction has one victim. A charge with multiple victims cannot merge with a crime with a single victim. ***Dunaway***, 109 Wn.2d at 251. The burglary and felony harassment convictions must be treated separately.

Defendant has not carried his burden of showing deficient performance or resulting prejudice. Defendant's counsel was a zealous advocate at trial. Defendant fails to establish a reasonable probability that the outcome of his case would have been different had the alleged deficient performance been cured. There is no reasonable probability that the court would have not applied the burglary anti-merger statute. There is also no reasonable probability that the court would have merged the convictions given that the crimes do not share the same intent, were not committed at the same time, and involve multiple victims. Based on a review of the entire record, defendant cannot show that his counsel was ineffective.

D. CONCLUSION.

For the reasons argues above, the State respectfully requests this Court to affirm defendants' convictions and sentences.

DATED: August 14, 2012

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Pierce County
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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/15/12
Date Signature

# PIERCE COUNTY PROSECUTOR

## August 15, 2012 - 9:54 AM

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